THE PERSONALITY OF ASSOCIATIONS

I

THE state knows certain persons who are not men. What is the nature of their personality? Are they merely fictitious abstractions, collective names that hide from us the mass of individuals beneath? Is the name that gives them unity no more than a convenience, a means of substituting one action in the courts where, otherwise, there might be actions innumerable? Or is that personality real? Is Professor Dicey right when he urges [1] that "whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law but from the very nature of things, differs from the individuals of whom it is constituted"? Does our symbolism, in fact, point to some reality at the bottom of appearance? If we assume that reality, what consequences will flow therefrom?

Certainly no lawyer dare neglect the phenomena of group life, even if on occasion [2] he denies a little angrily the need for him to theorize about them. For man is so essentially an associative animal that his nature is largely determined by the relationships thus formed. The churches express his feeling that he has need of religion. His desire for conversation and the newspapers results in the establishment of clubs. The necessity of social organization gave birth to the state. As his commercial enterprise began to annihilate distance, the trading company came into being. It would not, one urges, be over-emphasis to assert that in every sphere of human activity associations of some kind are to be found. They are the very life-breath of the community.[3]

And, somehow, we are compelled to personalise these associations. They demand their possessive pronouns; the church has "its" bishops. They govern a singular verb; the railway company

[1] LAW AND PUBLIC OPINION, p. 165.

[2] See, for instance, H. A. SMITH, LAW OF ASSOCIATIONS (1914), p. 129.

[3] On the relation between individual personality and social groups the reader will find much of deep interest in WILFRED RICHMOND, PERSONALITY AS A PHILOSOPHICAL PRINCIPLE (1900). I personally owe much to this fascinating book.

"employs" servants. The United States of America is greater than all Americans; it becomes a single individual, and fraternises, Jonathan-wise, with a John Bull in whom all Englishmen have their being. The Bank of England is — the phrase, surely, is remarkable — the "little old lady of Threadneedle Street"; but no one would speak of seven distinguished merchants as a little old lady. The House of Commons is distinct from "its" members, and, no less clearly, it is not the chamber in which they meet. We talk of "its" "spirit" and "complexion"; a general election, so we say, changes "its" "character." Eton, we know well enough, is not six hundred boys, nor a collection of ancient buildings. Clearly, there is compulsion in our personalising. We do it because we must. We do it because we feel in these things the red blood of a living personality. Here are no mere abstractions of an over-exuberant imagination. The need is so apparent as to make plain the reality beneath.

II

Now lawyers are practical men dealing with the very practical affairs of everyday life, and they do not like, in Lord Lindley's phrase,[4] "to introduce metaphysical subtleties which are needless and fallacious." The law, so they will say, knows persons; by Act of Parliament[5] "persons" may include bodies corporate. Persons are the subjects of rights and duties which the courts will, at need, enforce. If a body corporate is a person, it will also be the subject of rights and duties. If it is a person, it is so because the state has conferred upon it the gift of personality; for only the state can exercise that power. And the terms of such conference are strictly defined. The corporation is given personality for certain purposes to be found in its history, in its charter, its constituting act, its articles of association. The courts will say whether certain acts come within those purposes; whether, to use technical terms, they are *intra* or *ultra vires*. This limitation is in the public interest. "The public," so the courts have held,[6] "is entitled to hold a registered company to its registered business." The company

[4] Citizens' Life Assurance Co. *v.* Brown, [1904] A. C. 423, 426.

[5] 52 & 53 VICT., c. 63, § 19.

[6] Attorney-General *v.* Great Eastern Ry. Co., L. R. 11 Ch. D. 449, 503 (1879), per Lord Bramwell.

has a personality; but it has a personality capable only of very definitised development.

Why is it so limited? English lawyers, at any rate, have no doubt upon this question. The corporation is the creature of the state.[7] Its will is a delegated will; its purpose exists only because it has secured recognition. And, so the lawyers will tend to imply, it is in truth a fictitious thing. Persons, they know well enough, are human beings; the corporation is invisible and *in abstracto*.[8] It has no human wants. "It cannot," so an American judge has said,[9] "eat or drink, or wear clothing, or live in houses"; though hereto a sceptic might retort that a theory of domicile has given some trouble, and ask if there is not a solid reality about the dinners of the Corporation of London. "It is," said Marshall, C. J.,[10] "an artificial being, invisible, intangible, and existing only in contemplation of law" . . . "it is precisely," he says again, "what the act of incorporation makes it." "Persons," said Best, C. J., in 1828,[11] "who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the King, by usurping on his prerogative."

Nor are the textbook writers less definite. "They are legal persons," says Austin,[12] "by a figment, and for the sake of brevity in discourse." "To the existence of all corporations," wrote Kyd in 1793,[13] "it has long been an established maxim that the King's consent is absolutely necessary." "Ten men," notes Professor Salmond satirically,[14] "do not become in fact one person because they associate themselves together for one end any more than two horses become one animal when they draw the same cart." "The most marked distinction," Mr. Holland has written in a famous textbook,[15] "between abnormal persons is that some are natural . . . while others are artificial . . . which are treated by law for certain purposes as if they were individual human beings."

[7] *I. e.*, they accept the "concession" theory, so called. That they have accepted the "fiction theory" is denied by Sir F. Pollock in the LAW QUART. REV. for 1911.

[8] Sutton's Hospital Case, 10 Co. 13 (1612).

[9] Darlington *v.* Mayor, etc. of New York, 31 N. Y. 164, 197 (1865).

[10] Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 636 (1819).

[11] Duvergier *v.* Fellows, 5 Bing. 248, 268.

[12] JURISPRUDENCE, Lect. XII.

[13] 1 TREATISE ON CORPORATIONS, p. 41.

[14] JURISPRUDENCE (ed. of 1902), p. 350.

[15] JURISPRUDENCE, 11 ed., p. 385.

Here is clear doctrine enough — a vivid picture of an all-absorptive state. But when this supposed limitation has once been admitted, it is evident that the state is compelled to do remarkable things with the bodies it has called into being. It fails to regulate them with the ease that might be desired. The definition of *ultra vires*, for example, has become a formidable problem; there seems not a little of accident in the formulation of its principles. Corporations will have a curious habit of attempting perpetually to escape from the rigid bonds in which they have been encased. May we not say that, like some Frankenstein, they show ingratitude to their creators? Or, as artificial things, must we deem them incapable of such thought? A corporation will possess itself of an empire, and resent[16] interference with its domain. An American colony will incorporate itself; and when its creator shows signs of wanton interference, will take the lead in rebellion against the state which, in legal theory, at any rate, gave it birth. Truly the supposed sovereignty of the state is not apparent in the relations thus discovered. The orthodox doctrine needs somewhat closer examination before we accept its truth.

III

But even when we have so examined, there are associations which technically at least are not corporations. That trust which Maitland taught us to understand as so typically English will embrace many of them under its all-protecting fold. Contract, as in the club, will account for much, and with the aid of a little fiction we need have no fear of theory. A mighty church will in Scotland be a trust and not a corporation. In America the operations of certain trusts which are not corporations will necessitate a famous Act of Congress. For otherwise they can hardly come into the courts. They have no name by which to be sued. To the law, they are not persons, have no personality; they are bodies unincorporate, bodies — the thought is charmingly English — which are bodiless. Yet, curiously, the technical formulæ do not by their absence reveal any essential lack of corporate character. The Stock Exchange has, in any real meaning of the term, a personality as assuredly effective as that of Lloyds. If, to the law, they are essentially distinct, to practical men and women it seems useless to

[16] J. S. MILL, AUTOBIOGRAPHY, p. 143.

insist on the distinction as other than an empty formalism. The Stock Exchange is simply a property vested in trustees for the benefit of a few proprietors. Is it? Dare those trustees use it as property in that unpublic sense? Dare they so claim it and retain the respect of men with eyes to see? The technical distinction only made Archbishop Laud impatient when a Puritan trust had ruffled his temper.[17] Sour Bishop Montague who avowed that he had "spent some time in reading bookes of the Lawe," was beside himself at the unincorporate character of Lincoln's Inn.[18] Certain words of condemnation died out on Lord Eldon's lips when he thought of the silver cup the Middle Temple treasured. Here, as it seemed, was virtual corporateness, without the state's blessing of incorporation. Wrong, may be, it was thus to presume on kingly right; yet, of a truth, it was also significant.

Significant in what sense? In the sense, we argue, that legal practice has improved on legal theory. The judges builded better than they knew; or, mayhap, they have added yet another to the pile of fictions so characteristic of English law. If corporations can alone come up the front stairs, then they will admit the unincorporate association at the back. For, they know well enough, the life of the state would be intolerable did we recognise only the association which has chosen to accept the forms of law.

Clearly there is much behind this fiction-making. A sovereignty that is but doubtfully sovereign, an unincorporate body of which the bodiliness may yet equitably be recognised — certainly our fictions have served to conceal much. What, as a fact, is their justification? Why do they still invite, as they receive, a lip-given, if a heart-denied, profession of faith?

IV

When the history of associations which have been technically incorporated comes to be written, one clear generalisation as to its tenour during the nineteenth century will be admitted: the courts have been in practice increasingly compelled to approximate its position to that of an ordinary individual. The history has not been without its hesitations. The clear and vigorous mind of

[17] 7 GARDINER, HISTORY OF ENGLAND, p. 258. *Cf.* Maitland's introduction to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, p. xxxiii.

[18] 2 BLACK BOOK OF LINCOLN'S INN, pp. 332–3.

Lord Bramwell, for instance, left the emphatic mark of his dissent from its tendency written deep on English law.[19] The evolution, dating, so far as one can see, from no earlier time than the forties of last century,[20] of the doctrine of *ultra vires*, has in many ways acted as a limiting factor. Certain philosophic difficulties, moreover, as the significance of the *mens rea* in criminal liability, have proved stumbling blocks of a serious kind. Yet, on the whole, the progress is clear. The corporation is an obvious unit. It has rights and duties. It acts and is acted upon. The fact that its actions are of a special kind is not to prevent the courts from getting behind the visible agents to the invisible reality. If it is civilly reprehensible, it must bear the burden of its blameworthiness. Should it be guilty of crime the courts will, indeed, be less confident, but, as we shall see, the thin edge of the wedge has already been inserted. It needs but a little courage, and the reality of corporate crime will pass into the current coin of legally accepted doctrine.

Let us look at this tendency in some little more detail. Let us take, as a starting point, the corporate seal. It is but three quarters of a century since Rolfe, B., was laying down with emphasis that the seal was "the only authentic evidence of what the corporation has done or agreed to do." [21] Within thirty years that doctrine is obsolete. The seal, Cockburn, C. J., will declare,[22] as it seems to us almost lightly, "is a relic of barbarous antiquity," and will establish that the contracts of a trading corporation, made in pursuit of trade purposes, do not need that "only authentic evidence" of which Rolfe, B., had spoken. Nor has Parliament been less generous.[23] It is not now necessary, we know further, to use the seal in contracts of daily occurrence.[24] Nor may the absence of the seal be used to defeat the ends of justice. Work performed for purposes incidental to the corporate end must be paid for even when

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[19] See especially his remarks in Abrath *v.* North Eastern Ry. Co., 11 A. C. 247, 252 (1886).

[20] Mr. Carr in his brilliant essay on the Law of Corporations dates its origin from Colman *v.* Eastern Counties Ry. Co., 16 L. J. (Ch.) 73 (1846). I have been unable to find an earlier case.

[21] Mayor, etc. of Ludlow *v.* Charlton, 6 Mee. & W. 815 (1840).

[22] South of Ireland Colliery Co. *v.* Waddle, L. R. 4 C. P. 617 (1869).

[23] 30 & 31 VICT., c. 131, § 137.

[24] Wells *v.* Mayor, etc. of Kingston-upon-Hull, L. R. 10 C. P. 402 (1875).

the contract is unsealed and the corporation public in its nature.[25] If Parliament lays it down that urban authorities in their sanitary pursuits [26] must use the seal for all contracts over £50 in value,[27] that is an exception sufficient in itself to validate the general rule; nor do we feel aught save harshness in Lord Bramwell's grim comment upon its enforcement.[28]

The change is worth some little thought. We end the century with a doctrine almost entirely antithetic to that with which it began. The seal, once so lauded as alone authentic, a Chief Justice dismisses as barbarously antiquated. Why? The inference is clear. The seal hinders the free play of corporate activity, just as the robes of state hide beneath them the humanity of a king. And just as the latter will have his withdrawing-room, where, free from ceremonial, he may be himself, so will the corporation put off its seal that (if we may invoke a relic of barbarous anthropomorphism) its limbs may have free play. The corporation acts, seal or no seal. So it is right that the courts should look beneath the stiff encasement of formalism to the living reality which moves there.

We turn to contract. We approach it warily, for here is the head and center of fictional security. Here, we shall be told, it is finally made evident that the corporation exists nowhere save in legal contemplation. For what do we find? Take first the association incorporate by Act of Parliament. Beyond the four corners of its articles of association no movement is possible.[29] Even the corporation which the common-law prerogative has made will have limitations upon its capacity. It cannot do what it will. It has been created for a specific purpose. It must conform to that purpose, because it is the creature of those who called it into being.[30]

Now this theory of *ultra vires* is fundamental in the law of corporations. What is to be said for it? This, of a certainty, that it is in some wise needful to protect the corporators. A man who gives

[25] Clarke *v.* Cuckfield Union, 21 L. J. (Q. B.) 349 (1852); Lawford *v.* Billericay Rural District Council, L. R. [1903] 1 K. B. 772.

[26] The limitation is that of Joyce, J. Douglass *v.* Rhyl Urban District Council, L. R. [1913] 2 Ch. 407.

[27] 38 & 39 VICT., c. 55, § 174.

[28] Young & Co. *v.* Mayor, etc. of Leamington, 8 A. C. 517 (1883).

[29] Ashbury Railway Carriage Co. *v.* Riche, L. R. 7 H. L. 653 (1875).

[30] But § 9 of the Companies Consolidation Act of 1908 allows the alteration of the memorandum by special resolution. This is a great advance.

his money to a railway company does not expect it to engage in fishing; he ought to be protected against such activity. But an act incidental to the purposes of the company is not *ultra vires*. What is so incidental? It is incidental to the business of the South Wales Railway Company to run steamboats from Milford Haven;[31] but that function was seemingly beyond the competence of the Great Eastern.[32] One steamship company may, without hindrance, sell all its vessels;[33] but another company makes the mistake of retaining two of its boats, and its act is without the law.[34] There were two railway companies within recent memory which agreed to pool their profits and divide them with judicial blessing;[35] but two other railway companies speedily discovered their powerlessness when they attempted partnership.[36] It is fitting, so the courts have held, that Wigan and Ashton should supply their citizens with water;[37] but there was, so we may suppose, something unfitting when Southampton and Sheffield attempted that enterprise.[38] But perhaps the nadir of such confusion is seen by anyone who contrasts *Stephens* v. *Mysore Reefs, etc. Co., Ltd.*[39] with *Pedlar* v. *Road Block Gold Mines of India, Ltd.*[40]

Logic here there certainly is not, though the basis of the distinction is easy to understand. "Where a corporation," said Coleridge, J.,[41] "has been created for the purpose of carrying on a particular trade, or making a railway from one place to another, and it attempts to substitute another trade, or to make its railway to another place, the objection is to its entire want of power for the new purpose; its life and functions are the creation of the legislature; and they do not exist for any other than the specified purpose; for any other, the members are merely unincorporated individuals." But the doctrine results in manifest injustice. A

[31] South Wales Ry. Co. *v.* Redmond, 10 C. B. N. S. 675 (1861).

[32] Colman *v.* Eastern Counties Ry. Co., 10 Beav. 1 (1846).

[33] Wilson *v.* Miers, 10 C. B. N. S. 348 (1861).

[34] Gregory *v.* Patchett, 33 Beav. 595 (1864).

[35] Hare *v.* London & N. W. Ry. Co., 2 J. & H. 80 (1861).

[36] Charlton *v.* Newcastle & Carlisle Ry. Co., 5 Jur. N. S. 1096 (1859).

[37] Bateman *v.* Mayor, etc. of Ashton-under-Lyne, 3 H. & N. 323 (1858), and Attorney-General *v.* Mayor, etc. of Wigan, 5 DeG. M. & G. 52 (1854).

[38] Attorney-General *v.* Andrews, 2 Mac. & G. 225 (1850); Sheffield Waterworks Co. *v.* Carter, 8 Q. B. 632 (1882).

[39] L. R. [1902] 1 Ch. 745.

[40] L. R. [1905] 2 Ch. 427. See especially the remarks of Warrington, J., at p. 437.

[41] Mayor, etc. of Norwich *v.* Norwich Ry. Co., 4 E. & B. 397, 432 (1855).

company has by its charter the right to borrow not more than a specified sum; it borrows more. It is held that the lenders cannot sue for the surplus.[42] Yet it is obviously unjust that a corporation should thus benefit by an error of which it has been cognizant. It is surely an unwise restriction of business enterprise so closely to restrict the interpretation of powers as to refuse a company the legal benefit of its commercial capacity to build a railway.[43] A corporation can be prevented from contributing to a charity;[44] it may, on the other hand, show gratitude to its servants.[45] It is clear enough that we have no straight rule of construction to guide us. It is held that a corporation "may" not do certain things. Does that imply that it should not have done so, or that it is legally incapable — "stricken with impotence" is a distinguished lawyer's forcible phrase[46] — of doing them? Is an *ultra vires* act not a corporate act? The courts would seem to uphold this view. "The question is not," said Lord Cairns in the Ashbury case,[47] "as to the legality of the contract; the question is as to the competency and power of the company to make the contract." But that is not a very helpful observation when it is borne in mind that *ultra vires* acts are performed every day. And if the courts hold such acts *a priori* illegal, why do they time and again enforce them in order to prevent harshness? Is not that a virtual admission of their corporateness? Such admission can only mean that in the great realm of contract, as in the case of the seal, we cannot confine the personality of a corporation within the four walls of a document. We are in fact compelled to abandon the doctrine of special capacity. We have to admit that a person, whether a group person or a human being, acts as his personality warrants. Legal theory may deny the fact of a contract which has obviously taken place; but in that event it is only so much the worse for legal theory.

For it results in the divorce of law and justice. A corporator, for instance, severs his connection with a corporation in a manner that

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[42] Wenlock *v.* River Dee Co., 10 A. C. 354 (1885).

[43] As in the great Ashbury case.

[44] Tomkinson *v.* South Eastern Ry. Co., L. R. 35 Ch. D. 675 (1887).

[45] Hampson *v.* Price's Patent Candle Co. And yet an able writer can argue that the existence of corporate gratitude does not come within the lawyer's purview. SMITH, LAW OF ASSOCIATIONS, pp. 130–1.

[46] Mr. E. Manson in 12 ENCYCLOPEDIA OF THE LAWS OF ENGLAND, 1 ed., p. 360.

[47] Ashbury Railway Carriage Co. *v.* Riche, L. R. 7 H. L. 653, 672 (1875).

is *ultra vires;* ten years later he is held responsible for its debts.[48] Of a surety, no man will claim justice or sweet reasonableness for such an attitude. The courts, again, in the case of a man who has made a contract and then feels it irksome, will not admit the plea that he was originally incapable of making it. They will say with Wilmot, C. J., that "no polluted hand shall touch the pure fountain of justice." [49] But if the hand be a corporate hand, as, for instance, in *Hall* v. *Mayor, etc. of Swansea,*[50] they would have no hesitation in admitting the pollution.

What are we to say? Only one thing surely, and that is that the doctrine of *ultra vires* breaks down when it is tested. It is not true because it fails to conform to the canon of scientific hypothesis: it does not fit the facts. We assume the artificiality of our corporation. We suppose that it is no more than we have made it, with the result that common sense must be thrown to the winds. What, in brief, the theory compels us to urge is this, that a class of acts may be performed by the corporation which are not corporate acts. Is it not better to risk a little for the sake of logic? Our fiction-theory may, indeed, break down; but we shall bring the law in closer harmony with the facts of life. We shall then say that the corporation, being a real entity, with a personality that is self-created, and not state-created, must bear the responsibility for its actions. Our state may, in the result, be a little less Hegelian, a little less sovereign in its right of delegation. Therein it will only the more certainly make a direct march upon the real.

V

The corporation has rights and liabilities in tort. Here, again, the tendency has been more and more to make it approximate in situation to the ordinary individual. So long ago as the reign of Henry VII the corporation could bring an action for trespass.[51] When a patron of a living it could bring an action of *quare impedit.*[52] It can sue for libel where it can show that its property is affected,[53] though it is not clear that it could sue for words spoken in deroga-

[48] *In re* Stanhope, 3 DeG. & Sm. 198 (1850).

[49] Collins *v.* Blantern, 2 Wilson 341, 350 (1767).

[50] 5 Q. B. 526 (1844).

[51] Y. B. 7 HEN. VII, pl. 9.

[52] Chancellor, etc. of Cambridge *v.* Norwich, 22 Viner's Abr. 5 (1617).

[53] Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 87 (1859); South Hetton Coal Co. *v.* North-Eastern News Ass'n, L. R. [1894] 1 Q. B. 133.

tion of its honour or dignity.[54] This is, so we are told, due to the physical limitations to which it is subject. "It could not sue," said Pollock, C. B.,[55] "in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may." But is this, in fact, true? No one would think of charging an association with incest or adultery. But it can be sued for malicious libel,[56] for assault and imprisonment,[57] for fraud and deceit,[58] and, after a long struggle in which the formidable Lord Bramwell played a noteworthy part, for malicious prosecution.[59] Now when this formidable list of torts is considered it seems curious to say that the corporation cannot sue for libel that touches its honour or dignity. The reason, so far as one can see, is twofold. It is, in the first place, assumed *ipso facto* that the corporation has no mind to feel. It is no more than a way of dealing with certain rights in property in such a way that they can be conveniently protected by the courts. The doctrine of agency, moreover, is used as a means of avoiding the complex metaphysical problem of what is behind the agent. This was well shown in Lord Lindley's remarkable judgment in *Citizens' Life Assurance Co.* v. *Brown*. "If it is once granted," he said, "that corporations are for civil purposes to be regarded as persons, *i. e.*, as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals." In that case, clearly, the actual tort is the act of the agent and the principal is reduced to a mere fund from which adequate compensation may be obtained. But is that in truth a satisfactory method of procedure? Are the "metaphysical subtleties" of which Lord Lindley spoke so deprecatingly in truth "needless and fallacious?" Is it not in fact necessary to have some clear view of their nature if a true decision is to be reached?

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[54] Mayor, etc. of Manchester *v.* Williams, L. R. [1891] 1. Q. B. 94.

[55] Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 87 (1859), at p. 90.

[56] Whitfield *v.* South-Eastern Ry. Co., 27 L. J. (Q. B.) 229 (1858).

[57] Eastern Counties Ry. Co. *v.* Broom, 6 Exch. 314 (1851).

[58] Barwick *v.* Eng. Joint Stock Bank, L. R. 2 Ex. 259 (1867).

[59] Citizens' Life Assurance Co. *v.* Brown, [1904] A. C. 423, 426. The story of the struggle is well told in Mr. Carr's book, pp. 78–87.

In order to see this aspect in a clearer light let us turn to the criminal liability of corporations. It is now well established that a corporation may be indicted for misfeasance,[60] for obstruction,[61] under the Lotteries Act [62] (though here the courts refused to admit an indictment of the corporation as a rogue and vagabond), for selling impure food [63] and for adulterating milk.[64] But in all these cases conviction has been obtained on the basis of a supposed liability for an agent's act. This is well brought out in a remark of Alverstone, C. J., "I think that we ought to hold that a corporation may be liable . . . unless *mens rea* is necessary in order to constitute the offence." [65] But that is the exact point. Is a corporation to be held guiltless where the presence of *mens rea* is necessary to the crime? A laundry company fails adequately to protect its machinery in accordance with law, and one of its employees is killed. There was clear criminal negligence; but on an indictment for manslaughter the judge, a little reluctantly, refused to allow the action to proceed.[66] In the next year a railway company caused the death of some of its passengers through not keeping a bridge in proper repair; here again, though with obvious difficulty, the court thought the demurrer must be admitted.[67] Clearly, the problem of whether a corporation can have a *mens rea* has, if sometimes a little doubtfully, been answered in the negative.[68] Taken with the cases in tort, we must collect the opinion that it cannot have a mind at all.

VI

Yet we cannot, in fact, do without that mind. Just as we have been compelled by the stern exigencies of events to recognise that the corporation is distinct from its members, so, too, we have to recognise that its mind is distinct from their minds. A corporation votes an annual pension to a servant; its gratitude is not merely

[60] Queen *v.* Birmingham & Glouc. Ry. Co., 3 Q. B. 223 (1842).
[61] Queen *v.* Great North of England Ry. Co., 9 Q. B. 315 (1846).
[62] Hawke *v.* Hulton & Co., L. R. [1909] 2 K. B. 93.
[63] Pearks, etc. *v.* Ward, L. R. [1902] 2 K. B. 1.
[64] Chuter *v.* Freeth, etc., L. R. [1911] 2 K. B. 832.
[65] Cited in Pearks, etc. *v.* Ward, L. R. [1902] 2 K. B. 1, at p. 8.
[66] Queen *v.* Great West. Laundry Co., 13 Manitoba Rep. 66 (1900).
[67] Union Colliery Co. *v.* H. M. The Queen, 31 Can. Sup. Ct. 81 (1900).
[68] Perhaps Lord Bowen in Queen *v.* Tyler & International Commercial Co., Ltd., felt some difficulty also. L. R. [1891] 2 Q. B. 588. See especially pp. 592, 594, 596.

the gratitude of the individual members expressed in a single term, for one of those members will endeavour to restrain its generosity.[69] So it may well be urged that in the cases of manslaughter noted above a penalty ought to be exacted in some wise commensurable with the offence. When we talk of a company as a "bad master," there is surely reality behind that phrase. Individually its members are probably meek and kindly; but the company is differently constituted. Where that "badness" passes into the region in which it becomes criminally culpable, the company ought to suffer the penalty for its blameworthiness. Certainly it does so suffer when it is morally but not legally at fault. Its men work for it with less zeal. It finds it difficult to retain their services. The quality of its production suffers. It loses ground and is outstripped in the industrial race. Why the courts should refuse to take cognizance of that which is an ordinary matter of daily life it is difficult indeed to understand. Take, for example, the charge of manslaughter. Any student of workmen's compensation cases will not doubt that in a choice between the adoption of a completely protective system and the possibility of an occasional accident, there are not a few corporations anti-social enough to select the latter alternative. Human life, they will argue, is cheap; the fencing, let us say, of machinery is dear. But admit the existence of the corporate mind and that mind can be a guilty mind. It can be punished by way of fine; and if it be mulcted with sufficient heaviness we may be certain that it will not offend again. What is the alternative? To attack some miserable agent who has been acting in the interest of a mindless principal, an agent, as Maitland said,[70] who is the "servant of an unknowable Somewhat." But if that Somewhat be mindless, how can it have selected an agent? For selection implies the weighing of qualities, and that is a characteristic of mind.

VII

When, therefore, we look at the association which has chosen to incorporate itself, we cannot but feel that less than the admission of a real personality results in illogic and injustice. It is purely arbitrary to urge that personality must be so finite as to be distinc-

[69] Cyclists' Touring Club *v.* Hopkinson, L. R. [1910] 1 Ch. 179.

[70] Introduction to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, p. xl.

tive only of the living, single man.[71] Law, of a certainty, is not the result of one man's will, but of a complex fusion of wills. It distils the quintessence of an infinite number of personalities. It displays the character not of a Many, but of a One, — it becomes, in fact, unified and coherent. Ultimately pluralistic, the interactions of its diversities make it essentially, within the sphere of its operations, a single thing. Men obey its commands. It acts. It influences. Surely it is but a limitation of outlook not to extend the conception of personality into this incorporeal sphere.

It is urged that to neglect this is to commit injustice where the corporation is concerned. Even less happy shall we feel when we turn to the association that is, oddly enough, termed voluntary; as if your unincorporate body were any less the result of self-will than its corporate analogue. We shall find no law of associations. What we shall find is rather a series of references to the great divisions, contract, tort, and the like, of ordinary law. For here, in the legal view, we have no bodiliness, nothing more than a number of men who have contracted together to do certain things, who, having no corporate life, can do no more than those things for which the agreement has made stipulation. Legally they are no unit, though to your ordinary man it is a strange notion that a Roman Church, a Society of Jesus, a Standard Oil Trust — the most fundamentally unified persons, so he would say, in existence — should be thus devoid of group will because, forsooth, certain mystic words have not been pronounced over them by the state. Laughable to most of us this may indeed be; yet none the less certainly is it good law.

We take the voluntary society in contract. Its acts are *ultra vires* unless they were clearly implied in the original agreement. You join a club. An unwise draftsman has failed through inadvertence to make binding the right to change the rules. When, therefore, the club falls on evil days and changes its subscription you may refuse to pay on the ground that you have not contracted to do so.[72] It does not matter that the subscription had been already raised several times; it does not matter that you had assented to the previous changes; that there was practical unanimity among

[71] *Cf.* F. H. BRADLEY, APPEARANCE AND REALITY, p. 532. "For me a person is finite or is meaningless."

[72] Harington *v.* Sendall, L. R. [1903] 1 Ch. 921.

the members as to the need for the change; that without it the whole future of the club was jeopardised. Of all this the courts made entire abstraction. The contract is a fundamental agreement which cannot admit of change. A society clearly living a life of its own will be denied the benefits of that life because it has failed to take advantage of a section in an Act of Parliament.

Nor is the full significance of this judgment clear until one places it side by side with the case of *Thellusson* v. *Valentia*.[73] The Hurlingham Club from its origin indulged in pigeon-shooting. It was decided to do so no longer, and the plaintiff sought to obtain an injunction preventing the change on the ground that he had contracted for this sport on joining the club. Yet it was held that the change came under the clause admitting the alteration of the rules and was not a fundamental change. It surely will not be argued that a change in a subscription rate is any more fundamental than this. As a plain matter of common sense it is surely obvious that if a society can do the one thing the other should be permitted. If the courts will not protect the prejudices of members whose sporting tastes verge on the antiquarian, why should it protect those whose social tastes verge on the sullen disagreeableness of the boor?

Nor are matters improved when the trust conceals the reality of this group life. The trust, says Maitland,[74] "has served to protect the unincorporated *Genossenschaft* against the attacks of inadequate and individualistic theories. We should all agree that if an *Anstalt* or a *Genossenschaft* is to live and thrive it must be efficiently protected by law against external enemies." If it is to live *and thrive* — let us repeat the words in the way in which we would wish the emphasis to lie. The association is to thrive. It is not to have its life cramped, its development impeded. It is to be sheltered against the attacks of men willing to take advantage of its corporality. So, at least one would think, the trust came into being. And yet it is in precisely the opposite way that the courts have interpreted their purpose. Men's minds may change. Their purposes may change. Not so the purposes of men bound together in an association. The famous Free Church of Scotland case needs no retelling; the House of Lords chose to regard its life as fixed

[73] L. R. [1907] 2 Ch. 1.

[74] 3 COLL. PAPERS, p. 367.

for it by the terms of a trust — not seeing that the fact that the church has a life must necessarily connote its right to develop the terms on which that life is lived.[75] Certain eloquent words of Lord Macnaghten, spoken in his dissenting judgment, serve to make clear the opportunity the highest English tribunal chose to neglect. "Was the Church," he asked, "thus purified — the Free Church — so bound and tied by the tenets of the Church of Scotland prevailing at the time of the Disruption, that departure from those tenets in any matter of substance would be a violation of that profession or testimony which may be called the unwritten charter of her foundation, and so necessarily involve a breach of trust in the administration of funds contributed for no other purpose but the support of the Free Church — the Church of the Disruption? Was the Free Church by the very condition of her existence forced to cling to her Subordinate Standards with so desperate a grip that she has lost hold and touch of the Supreme Standard of her faith? Was she from birth incapable of all growth and development? Was she (in a word) a dead branch and not a living Church?" [76] We must, surely, accept the point of view of Lord Haldane when he argued that "the test of the personal identity of this Church lies not in doctrine but in its life." To insist on the strictest adherence to the letter of a trust means that the dead hand shall regulate the living even when they have outgrown that hand's control, sixty or six hundred years after its decease. Is there any answer to the protest of Mill when he urged that no person ought thus to be exercising the rights of property six hundred years after his death?[77] It is more plausible to take one's stand on the spirit of the trust. It would not in substance have been far removed from the doctrine of *cy près* for the House of Lords to have granted the right of self-development to the beneficiaries of a trust. It is clear, for instance, that religious interpretation has vastly changed since the advent of Darwinism. Would the courts have deprived a church which had so modernised its creed as to take account of the new knowledge from enjoying gifts left to it in a pre-Darwinian age? It is not, at any rate, insignificant that the justice of the courts had speedily to be remedied by Act of Parliament.

[75] On all this DR. J. N. FIGGIS, CHURCHES IN THE MODERN STATE, is of very high value.

[76] Orr, report of Free Church of Scotland case, p. 573. S. C. 4 F. 1083 (1902).

[77] 1 DISSERTATIONS AND DISCUSSIONS, p. 36.

It is no light stumbling-block that this cover of trusteeship has proved. It may be that the trustees of a club will incur liabilities on that club's behalf, though the rules have failed to provide for their indemnity. In that event the members will be able to avoid payment on the ground that they have contracted for no more than their subscriptions, even though the club (and they as its members) enjoy the benefit of the trustees' action.[78] Yet it would appear to the man in the street more equitable to make the club pay for that of which it enjoys the benefit. If, for example, the committee of a football club employs an incompetent person to repair a stand which collapses, sanity would appear to require that just as the club would have enjoyed the profits, so, on the collapse of the stand, it is right that it should suffer the penalties. Yet the courts, taking their stand on the principles of the law of contract, held that the members of the committee were responsible and must pay as individuals.[79] This is surely the violation of the ordinary principle of English law that he who holds property must bear its burdens no less than enjoy its advantages; nor should an agency or trusteeship obscure the real relation. A case can be conceived, can easily arise, where, without any knowledge on the part of the trustees, and by sheer misadventure on the part of one of their servants, they become liable for damages and the members go scot free. This is surely the *reductio ad absurdum* of legal formalism. Had the Privy Council in *Wise* v. *Perpetual Trustee Co.* applied the perfectly straightforward doctrine of *Hardoon* v. *Belilios* [80] no injustice would have thus occurred.

And the contractual theory of voluntary associations can result in fictions compared to which the supposed fiction of corporate personality has less than the ingenuity of childish invention. If you buy a liqueur in a club that does not, in the eyes of the law, constitute a sale. What was before a joint interest of all the members has been magically released to you just at the moment when you expressed your desire to the club waiter, with the result that you can drink in safety.[81] Is it worth while thus to strain reality for the sake of inadequate theory?

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[78] Wise *v.* Perpetual Trustee Co., [1903] A. C. 139.

[79] Brown *v.* Lewis, 12 T. L. R. 455 (1896).

[80] [1901] A. C. 118.

[81] Graff *v.* Evans, 8 Q. B. D. 373 (1882).

Certain property rights serve to bring out the failure of the contractual attitude with striking clearness. The luckless fate of Serjeants' Inn, of Clements' Inn, and Barnard's Inn shows how disastrous can be the attempt to conceal corporateness to the public interest.[82] No one believes that the distribution of their property among the surviving members fulfilled the pious purpose of their founders. The property of the unincorporate association can now be taxed [83] (and for income tax at that); but the courts did not tell us whether this was a new method of double taxation or an attempt to recognise the fact of corporateness. The fact that the fishermen of the Wye had for a period certainly not less than three centuries had a perfectly unquestioned user, had therein acted exactly as, in like circumstances, a prescriptive corporation would have acted,[84] did not persuade the Lords to regard them as having rights against the technical owners of the land.[85] It were surely an easier as well as a wiser thing to give to this obvious unit the title of unity.

Yet another curiosity deserves some notice. The courts do not regard a volunteer corps as a legal entity, so that it cannot be bound by contract. It can become bound only by particular members pledging their liability on its behalf, not for it as agents but for themselves as principals. So a commanding officer of a volunteer corps will be held responsible for uniforms supplied to the corps; [86] though, anomalous as it may seem, he is not responsible to the bankers of the batallion for its overdraft.[87] If a corps cannot have a liability for uniforms, why can a liability for its overdraft exist? And, further, if "it" is no legal entity at all, why do we use collective nouns with possessive pronouns and singular verbs?

Now in all conscience these are absurdities enough; yet note what has followed from the denial of a right to sue and be sued. It was the mere accident of his membership of the Middle Temple which made Lord Eldon grant to a body of Free Masons the right to a

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[82] See a deeply interesting letter in the TIMES for April 10, 1902.

[83] 48 & 49 VICT., c. 51, and Curtis *v.* Old Monkland Conservative Ass'n, [1906] A. C. 86.

[84] *In re* Free Fishermen of Faversham, L. R. 36 Ch. D. 329 (1887).

[85] Harris *v.* Chesterfield, [1911] A. C. 623. Lord Loreburn read a valuable dissenting judgment.

[86] Samuel Brothers, Ltd. *v.* Whetherly, L. R. [1908] 1 K. B. 184.

[87] National Bank of Scotland *v.* Shaw, [1913] S. C. 133.

representative action. It might have been, as he said,[88] "singular that this court should sit upon the concerns of an association, which in law has no existence," but it was just because it had an existence in life that the law had to take some account of it. "The society must," as Eldon saw, "some way or other be permitted to sue." Why? Because without that permission the gravest injustice would occur and to refuse it is to negative the whole purpose for which the courts exist. It was, again, a great advance when a private Act of Parliament enabled a voluntary society to sue in the name of its chairman.[89] But it does not go far enough. The entities the law must recognise are those which act as such, for to act in unified fashion is — formality apart — to act as a corporation. When the Scottish courts upheld a verdict against the libellers of "the Roman Catholic authorities of Queenstown," they knew that no corporation had been libelled, but a body of men to be regarded as a unit for practical purposes. That body had suffered in reputation from the libel; it was right and fitting that it should receive compensation.[90] And when a voluntary society in the pursuit of its functions libels a company without justice, it seems rational, even if it is legally an innovation, to make the society pay.[91]

Nothing has brought into more striking prominence the significance for practical life of this controversy than the questions raised in the last decade and a half by trade-union activity. Of the rights and wrongs of their policy great authorities have written;[92] and it is not now needful to discuss at length the decisions of the courts. But this much may at least be said: that just as surely as the decision of the House of Lords marked, in the great Taff Vale case,[93] a vital advance, so, no less surely, did its decision in the Osborne case[94] mark a reactionary step. The Taff Vale case decided, as it appears to us, quite simply and reasonably, that a trade union must be responsible for the wrongs it commits, — a

[88] Lloyd *v.* Loaring, 6 Ves. 773, 778 (1802).

[89] Williams *v.* Beaumont, 10 Bing. 260 (1833).

[90] Brown *v.* Thomson & Co., [1912] S. C. 359.

[91] Greenlands, Ltd. *v.* Wilmshurst, L. R. [1913] 3. K. B. 507.

[92] See particularly the Report of the Royal Commission on Trade Disputes, 1906; the preface to the 1911 edition of WEBB, HISTORY OF TRADE UNIONISM; and above all, the brilliant articles of Professor Geldart in 25 HARV. L. REV. 579 and POL. QUART. for May, 1914.

[93] [1901] A. C. 426.

[94] [1910] A. C. 87.

point of view which so impressed the Royal Commission that they did not recommend the reversal of the judgment.[95] The Osborne case decided that a method of action which a trade union thinks necessary for its welfare and protection may be illegal because it is political and not industrial in its scope — political objects being *eo nomine* beyond the province of a trade society. But that is surely a too narrow interpretation of the facts. Where does a political object end and an industrial object begin? It is obvious to anyone who has eyes to see that at every point modern politics is concerned with the facts of everyday life in its industrial aspect. Therein they clearly touch the worker, and the trade union is an association formed for his protection. On this view the political activity of trade unions means no more than giving emphasis to one particular branch of their industrial policy. It is, then, one would urge, open to the courts to declare the transaction void on grounds of public policy;[96] but it is probable that they would pay dearly for so doing in the loss of the respect in which they are held. It is wiser when dealing with the group person not to interfere with its individual life. The experience of the Privy Council as an ecclesiastical tribunal might herein have given a lesson to the House of Lords. There was it sternly demonstrated that the corporation of the English Church — a corporation in fact if not in law — will not tolerate the definition of its doctrine by an alien body.[97] The sovereignty of theory is reduced by the event to an abstraction that is simply ludicrous. It may well be urged that any similar interference with the life of trade unions will result in a not dissimilar history.

VIII

We have travelled far, but at least there has been direction in our travelling. We have asked a question: is corporate personality a real thing? Is the collective will that is the inevitable accompaniment of that personality but a figment of the imagination? The thesis that has been here maintained is a simple one. It is that when the man in the street calls (let us say) Lloyds and the Stock Exchange corporations he is profoundly right in his perception.

[95] Report, p. 8.

[96] As Lord Shaw did in the House of Lords, and, in part, Farwell and Fletcher Moulton, L. J. J., in the Court of Appeal below.

[97] See on this the Report of the Royal Commission on Ecclesiastical Discipline of 1906 *passim*.

He has brushed aside the technicalities of form and penetrated to the reality, which is but a cloud serving not to reveal but to obscure. This, it may be pointed out, Erle, J., perceived nearly sixty years ago.[98] "According to the plaintiff," he said, "it is supposed to be a corporation created for the purpose of the navigation, and having the legal incidents of its existence limited for that purpose. But it appears to me that, by common law, the creation of a corporation conferred on it all the rights and liabilities in respect of property, contracts and litigation which existence confers upon a natural subject, modified only by the formalities required for expressing the will of a numerous body." Here, at any rate, is the basis of much-needed innovation. A corporation is simply an organised body of men acting as a unit, and with a will that has become unified through the singleness of their purpose. We assume its reality. We act upon that assumption. Are we not justified in the event?

After all, our legal theories will and must be judged by their applicability to the facts they endeavour to resume. It is clear enough that unless we treat the personality of our group persons as real and apply the fact of that reality throughout the whole realm of law, what we call justice will, in truth, be no more than a chaotic and illogical muddle.

English lawyers, it is said, have a dislike of abstractions. Such excursions as this into the world of legal metaphysics have for them the suspect air of dangerous adventure. But life, after all, is a series of precipices, and we have to act upon the assumptions we make. Here we urge a radical thesis; we say that the distinction between incorporate and voluntary association must be abolished. We say that the trust must be made to reveal the life that glows beneath, that we must have the means of penetrating beyond its fictitious protectiveness. No one doubts that the change will be vast. No one doubts that the application will need courage and high resolve. But it is in its very difficulty that we shall find its supreme worth.

IX

A last word remains to be said. If what we have here been urging is true, it reacts most forcibly upon our theory of the state.

[98] Bostock *v.* North Staffordshire Railway Co., 4 E. & B. 798, 819 (1855).

[99] De Mon., c. 15.

Thus far, for the most part, we have sought its unification. We have made it intolerant of associations within itself — associations that to Hobbes will appear comparable only to "worms within the entrails of a natural man." As a result we have made our state absorptive in a mystic, Hegelian fashion. It is all-sovereign and unchallengeable. It has, if it be the papal state, and the Pope its personification, the *plenitudo potestatis;* be it imperial, its emperor is *legibus solubus;* be it Britannic, its parliament has, as De Lolme somewhat whimsically pointed out, no limit in power save the laws of nature. We seem, when we front the state, to cry with Dante that the *maxime unum* must be the *maxime bonum*,[99] and with Boniface VIII that there is heresy in political dualism.[100] Admirable enough this may be in theory; of a certainty it does not fit the facts. We do not proceed from the state to the parts of the state, from the One to the Many, on the ground that the state is more unified than its parts. On the contrary, we are forced to the admission that the parts are as real, as primary, and as self-sufficing as the whole. "The pluralistic world," said James,[101] "is . . . more like a federal republic than an empire or a kingdom. However much may be collected, however much may report itself as present at any effective center of consciousness or action, something else is self-governed and absent and unreduced to unity." But sovereign your state no longer is if the groups within itself are thus self-governing. Nor can we doubt this polyarchism. Everywhere we find groups within the state which challenge its supremacy. They are, it may be, in relations with the state, a part of it; but one with it they are not. They refuse the reduction to unity. We find the state, in James' phrase, to be distributive and not collective. Men belong to it; but, also, they belong to other groups, and a competition for allegiance is continuously possible. Here, as a matter of history, we find the root of Mr. Gladstone's attack on the Vatican decrees of 1870. An allegiance that is unreduced to unity appeared to him without meaning. Yet it is obvious that every great crisis must show its essential plurality. Whether we will or no, we are bundles of hyphens. When the centers of linkage conflict a choice must be made.

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[100] See the Bull Unam Sanctam, c. 1, Ex. Com. 1, 8.

[101] A PLURALISTIC UNIVERSE, p. 321. The whole book has vital significance for political theory; see especially the fifth lecture.

Such, it is submitted, is the natural consequence of an admission that the personality of associations is real and not conceded thereto by the state. We then give to this latter group no peculiar merit. We refuse it the title of creator of all else. We make it justify itself by its consequences. We stimulate its activities by making it compete with the work of other groups coextensive with or complementary to itself. As it may not extinguish, so it may not claim preëminence. Like any other group, what it is and what it will be, it can be only by virtue of its achievement. So only can it hope to hand down undimmed the torch of its conscious life.

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